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No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law

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No Bonds but Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law

VINCENT D. ROUGEAU[†]

ABSTRACT

This article explains the history of forced heirship in Louisiana and describes the negative implications of its demise. Section IV outlines how the end of forced heirship reveals the changing values of Louisiana culture and views on the family.

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I. INTRODUCTION

¶1 Does American law and public policy reckon adequately with the ways in which sharing and self-giving contribute to human flourishing? I believe that it does not, and in this article I demonstrate how an American legal system rooted in social contract theories of liberalism is incapable of sustaining legal rules and principles that take seriously social situation and dependency. I argue further that the extraordinary deference American law gives to individual freedom can be particularly destabilizing to communities and legal systems that place a high value on communal interdependence and social solidarity, and that this presents an important challenge to those who believe that self-giving membership in families, communities, and other social groups is essential to human dignity and flourishing. As a way of demonstrating the seriousness of the problem, I describe how an ancient legal principle, in use around the world but only operative in the United States in the law of the State of Louisiana, was subverted by an American legal system and culture that was unwilling to embrace limitations on individual choice in order to promote communal ownership of goods and property within the family. American culture does not understand the human person as an individual situated in community with others, and basic principles of American law proceed from atomistic and utilitarian understandings of personhood that fail to recognize what Charles Taylor has called “irreducibly social goods.”¹ Consequently, the social or communal value of collective goods tends to be lost and the value of such goods is judged primarily on their ability to enhance individual well-being.

¶2 In the United States, an individual has extremely broad authority over the disposition of his or her assets in a will. In particular, adult children typically have no permanent claim on any portion of the assets of their parents. Until recently, Louisiana was the only American state that followed the civil law tradition of “forced heirship,” which creates a permanent forced share of an

¹ See, CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 127-145 (Harvard Univ. Press 1995). “Something is common not just when it exists not just for me and for you, but for *us*, acknowledged as such.” *Id.* at 139.

individual's estate in favor of his or her children, thus placing severe restrictions on a testator's ability to gratuitously dispose of wealth in a will or bequest. For various cultural, economic, and historical reasons, Anglo-American families have long been more loosely structured than those in many other parts of the world. This history, and a de-emphasis on the value of collective goods in American culture, has allowed Americans to accept rather easily a contractarian view of family relationships based on the willingness of individual members to be bound to the family unit. Consequently, there has been intense pressure to change legal rules that assume permanence in family ties. On the other hand, a unique cultural history within the context of the United States caused Louisiana to follow a different cultural pattern in which close extended family relationships were normative rather than exceptional. Although this family culture was fairly typical worldwide, over time, Louisiana was unable to maintain a legal norm at variance with broader American values, which led eventually to significant limitations on forced heirship in Louisiana law.

¶3 This Article is organized into three parts. Section II reviews the relatively narrow legal issue of the change in the doctrine of forced heirship in the Louisiana law of succession. For almost three hundred years, Louisiana law made it almost impossible for parents to disinherit their children. In 1999 a new law took effect, which allowed parents more freedom over the disposition of their estates once a child reached 23 years of age. Louisiana is unique among the states in the United States in its maintenance of a mixed legal system, one which combines aspects of the civil law and common law traditions, and Louisiana's law of succession follows the civil law tradition. Although the Louisiana rule is found throughout the rest of the world, every other American state organizes its inheritance law around the principle of donative or testamentary "freedom." Theoretically, the personal desires of the testator are superior to any claims that might be asserted against the estate based on a family relationship or public policy.²

¶4 In Section III, I shall demonstrate how a devotion to an understanding of freedom that privileges personal autonomy in American culture created an environment in which it became impossible for Louisiana to maintain a legal rule that proceeded from a notion of communal obligation as opposed to personal choice. Louisiana's law of succession was able to function as an anomaly in the American legal environment for as long as it did due primarily to the state's longstanding cultural isolation from the rest of the country, and from Herculean

² Eight American states, including the large states of California and Texas, follow the civil law tradition of "community property," which gives a 50% forced share, or at least require the equitable distribution, of all property acquired during a marriage to a surviving spouse. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 397-98 (4th ed. 1998). The common law does not automatically give spouses this right, but statutory law protects spouses' interest in the marital estate in all other American states except Georgia. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 121, 99-101, 136-37 (1994).

efforts by certain members of the state's political, legal, and social elites over the last century to retain civil law legal traditions. Furthermore in Louisiana, unlike most American states, Catholicism was the primary influence rather than Protestantism. Catholicism, which has remained a meaningful religious and cultural force for a large portion of the population, views the individual situated in community as an essential part of the common good, whereas many Protestant traditions, particularly the Southern Baptist and Evangelical forms of Protestantism quite dominant in the American South, emphasize a highly individual relationship with Jesus Christ and the importance of personal salvation. Forced heirship was eventually undermined in large part by media appeals that employed constructions of personal freedom and choice that were grounded in popular American understandings of the common good that see it as the maintenance of conditions that maximize the freedom to realize one's individual preferences. This vision was contrasted with the concept of long-term responsibility to others and the use of the authority of the state to promote a particular vision of societal good, ideas with increasingly little appeal in the United States. This atomistic American vision of personal freedom was simply too powerful for Louisiana law to continue to resist its influences, and the defenders of forced heirship eventually found it extremely difficult to make a compelling case to the public. In the cultural and economic homogenization that has been a hallmark of the post-World War II economic development in the United States and throughout the world, changes in forced heirship may be indicative of more significant changes to come to the Louisiana Civil Code, and may be yet another harbinger of the eventual disappearance of the state's unique culture.

¶5 In Section IV, I will argue that the American understanding of individual autonomy, which has gained increasing acceptance in many parts of the world, will make legal rules rooted in a communal understanding of the individual difficult, if not impossible, to sustain. The experience of the *légitime* in Louisiana may be particularly instructive to nations around the world that find themselves under intense pressure to modify their legal and economic environments in order to promote American-style capitalism and political liberalism. Although changes in the law are often indicative of important changes in the culture, the law is also a vehicle for promoting cultural change. As Mary Ann Glendon has noted, the "rights laden public discourse" of the United States, "easily accommodates the economic, the immediate, and the personal dimensions of a problem, while it regularly neglects the moral, the long-term, and the social implications."³ Americans must ask themselves if they are truly willing to live in a culture that roots family relationships in a libertarian vision of human autonomy.

³ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 171 (Free Press 1991).

II. THE LONG, DISTINGUISHED LIFE OF FORCED HEIRSHIP IN LOUISIANA

A. *The Legal Concept of Forced Heirship*

¶6 With a legal culture rooted in the civil law tradition inherited from France and Spain, and a social history as much Latin- as Anglo-American, the indigenous culture of Louisiana has long resisted various homogenizing influences from the rest of the United States. Yet despite its uniqueness, or perhaps because of it, Louisiana has always been under relentless pressure to conform itself to the legal and social trends in the other forty-nine states. For three hundred years, Louisiana retained a doctrine within its system of estate succession known as “forced heirship.” The concept of forced heirship makes it extremely difficult for a parent to disinherit a child because it reserves a forced share of the parent’s estate, known as the *légitime*, for descendants in the first degree.⁴ A child entitled to a

⁴ Most recently, the forced portion of a parent’s estate was typically 25% if the parent had one child, or 50% if there were two or more children (who would divide the 50% share equally). LA. CIV. CODE art. 1495 (LexisNexis 2003); Brashier, *supra* note 2, at 120-21.

forced share can be deprived of that share by the parent only under very narrow circumstances.⁵

¶7 In the United States, forced heirship is generally juxtaposed against the common law concept of testamentary freedom, which is the key principle underlying the system of testate succession prevailing in most American jurisdictions. Indeed, historical treatments of the development of the law of testamentary succession in the United States have noted that since the fifteenth century, “the emphasis in Anglo-American law has been on the right of the owner to choose rather than on the right of the family to share.”⁶ English colonists brought this disposition toward ownership to the North American colonies that would become the United States. The common law developed a system of “separate property,” in which, for example, marital status did not necessarily affect ownership of property acquired during a marriage. Ownership of property

⁵ The Louisiana Digest of 1808 drew twelve grounds for disinheritance from Spanish law, which remained in place through subsequent revisions of Louisiana law. Joseph W. McKnight, *Spanish Legitime in the United States*, 44 AM. J. COMP. L. 75, 85 (1996). The Louisiana Civil Code provided:

The just causes for which parents may disinherit their children are twelve in number.

There shall be a rebuttable presumption as to the facts set out in the acts of disinheritance to support these causes. The causes are, to wit:

1. If the child has raised his or her hand to strike the parent, or if he or she has actually struck the parent; but a mere threat is not sufficient.
2. If the child has been guilty, towards a parent of cruelty, or a crime of grievous injury.
3. If the child has attempted to take the life of either parent.
4. If the child has accused a parent of any capital crime, except, however, that of high treason.
5. If the child has refused sustenance to a parent, having means to afford it.
6. If the child has neglected to take care of a parent become insane.
7. If the child refused to ransom them, when detained in captivity.
8. If the child used any act of violence or coercion to hinder a parent from making a will.
9. If the child has refused to become security for a parent, having the means, in order to take him out of prison.
10. If the son or daughter, being a minor, marries without the consent of his or her parents.
11. If the child has been convicted of a felony for which the law provides that the punishment could be life imprisonment or death.
12. If the child has known how to contact the parent, but has failed without just cause to communicate with the parent for a period of two years after attaining the age of majority, except when the child is on active duty in any of the military forces of the United States.

LA. CIV. CODE art. 1621 (1996). Current Louisiana law contains eight grounds for disinheritance – refusal of sustenance, neglect to care for an insane parent, refusal to ransom, and refusal to bond a parent out of prison have all been removed from the original list, and minor changes were made to the eight grounds remaining. LA. CIV. CODE art. 1621 (2003).

⁶ McKnight, *supra* note 5, at 106.

was based on a theory of title, which meant the property of a husband or wife, although acquired while married, belonged legally to the individual holding title unless purposely co-mingled or designated as jointly owned.⁷

¶8 This title-based understanding of ownership also supported a right in a testator to control property after his or her death.⁸ One benefit often raised in support of testamentary freedom is that it recognized a certain liberty interest in the testator to control the fruits of his or her labor over a lifetime. This was a view that was well suited to the freedom rhetoric popular in the young American republic as it developed, particularly during the 19th century, when tremendous amounts of individual wealth were generated and the nation expanded westward.⁹ Indeed, as women have become more economically self-sufficient and divorce has escalated, this interest in personal control over the fruits of one's labor remains a powerful rationale for the system of separate property in the United States. Another putative benefit of testamentary freedom is a certain coercive power it gives parents over recalcitrant children. This type of power over others is not always exercised in admirable ways, but for better or for worse, the threat of disinheritance has long been understood in the Anglo-American world as an effective way to indicate displeasure with the behavior of one's offspring. Many a child has been "written out of the will" for choosing a career, a spouse, or a lifestyle, that a parent found dangerous or offensive.

¶9 On the one hand, this freedom in a testator might be said to truly respect human dignity and personal freedom by liberating individuals from state-coerced obligations to bestow wealth on their children. Arguably, voluntary giving is a particularly authentic expression of the bonds of love and affection that we hope exist between parents and children. On the other hand, deference to individual choice reveals how freedom of testation can foster a destructive sense of power over others and can nurture an understanding of familial bonds as conditional and revocable. Although there will always be relationships between parents and children that break down, should not the default position of the law be to assume intergenerational loyalty within families and to encourage equality and sharing? In American law, the act of disinheriting one's child is given legal and cultural legitimacy by creating a default assumption that an individual may act as she pleases when disposing of property, even when she has direct descendants. This

⁷ *Id.*

⁸ Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L. J. 1197, 1219 (1990).

⁹ "The individualistic spirit of the pioneer country was unsympathetic to restrictions on ownership, as limitations on testamentary freedom were often seen." McKnight, *supra* note 5, at 105. However, McKnight also notes that the endurance of community property in certain parts of the American West indicates more sympathy for the idea of a marital community property among Anglo-American pioneers as they moved westward, perhaps due to the growing emancipation of women on the frontier. *Id.* at 105-106.

suggests that it is not for the law or the state to assume that there is an appropriate, or socially preferable, way for a parent to treat a child when there is an inheritance. Yet, why is the social or communal meaning of the relationship between parent and child any less deserving of support by the law or the state than the promotion of freedom of action for individuals?

¶10 The concept of forced heirship in the civil law can be traced back to Roman law and the laws of the Germanic tribes of Europe.¹⁰ Forced heirship draws on the longstanding tradition throughout various parts of continental Europe of the family forming a “community” in which assets are pooled. Charles Donahue has described how, from at least the 13th century, the idea of family community was integrated into the succession law of France:

Perhaps even more striking than the amount of control the woman had in marital property is the amount of control the families of both husband and wife had in it. Family land could not be sold except for cause, and the family had what amounted to a right of first refusal in any sale of family land that came from its side. . . . In some areas this restriction also applied to gifts, in others, a system of *légitime* came to ensure that an heir would receive no less than one-half of what he would have received in intestacy; in still others no child could be favored to the detriment of his sibs.¹¹

¶11 Over the centuries, the law in France and other countries on the European continent developed a regime of community property in which a husband and wife typically owned in equal shares all assets acquired during a marriage.¹² In the United States the states that have chosen this rule have developed a very different theoretical understanding of marital property ownership. In discussing community and common law marital property regimes in the United States, Lawrence Waggoner has noted “how profoundly different these systems are. Community property reinforces a married spouse’s sense of participation in the

¹⁰ “The children’s right of *légitime* bears some resemblance to the claim of the heirs *ab intestato* in Roman law to challenge the will by a *querela inofficiosi testamenti*, and was considered by eighteenth century Scottish lawyers to have derived from the *legitima portio* given by the *Lex Falcidia*. PETER STEIN, THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 347 (Hambledon Press 1988); see also Thomas B. Lemann, *Forced Heirship in Louisiana: In Defense of Forced Heirship*, 52 TUL. L. REV. 20, 20 (1977).

¹¹ Charles Donahue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 80 (1979-1980).

¹² *Id.*

marriage and ownership of the marital estate. Separate property tends to place the non-property spouse in a subordinate position.”¹³

¶12 The difference in these marital property regimes may also suggest socio-cultural differences, and this is a critical factor to consider when assessing a similar divergence in the rules of testamentary succession. The concept of forced heirship is logically consistent with the understanding of family community that prevailed historically in the nations that employ the rule. A child born to a parent became a part of the community of the family. Just as a spouse had a permanent claim on the assets of the community, so too did the child. It is important that the forced heirship provisions of the Louisiana Civil Code be read in this light. These concepts come from a legal and cultural understanding of community that was deeply ingrained in the French and Spanish colonists who came to the Americas, and that cultural context gives a richer meaning to the general rules and individual acts of testation.¹⁴ The *légitime* came directly to Louisiana from the laws of France and Spain, and it remains a part of the law of these countries today.¹⁵ Indeed, it is interesting to note that while Louisiana is unique in the United States in its use of the *légitime*, forced heirship is the dominant legal practice throughout

¹³ Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 25 (1994).

For spouses in separate property states to operate as partners, the propertied spouse must decide to give ownership rights to the other spouse, by outright gifts or by putting his or her earnings into a joint checking or money market account. . . . These rules, then, serve to reinforce the profoundly different symbolical and psychological feelings within the ongoing marriage. Spouses are partners by right in community property states. Spouses are partners, if at all, by the generosity or continued commitment to the marriage of the propertied spouse in separate property states.

Id. at 26.

¹⁴ “Forced heirship recognizes that special link between parent and child that exists without regard to the age of the child. It is not bound to the notion of support.” Katherine S. Spaht et al., *The New Forced Heirship Legislation: A Regrettable “Revolution”*, 50 LA. L. REV. 410, 416-417 (1990). “[A]s individuals we value certain things; we find certain fulfillments good, certain expectations satisfying, certain outcomes positive. But these things can only be good in that certain way, or satisfying or positive after their particular fashion, because of the background understanding developed in our culture.” Taylor, *supra* note 1, at 136.

¹⁵ In modern French law the freely disposable portion of a parent’s estate is one-half if there is one child, one-third if there are two children, and one quarter if there are three or more children. The remaining portion is the *légitime*, which, in the cases where there is more than one child, is divided equally. French Civil Code (2005), Articles 913, 913-1, 914. *Translation available at* http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#CHAPTER%20III%20-%20OF%20THE%20DISPOSABLE. Louisiana’s legal inheritance from France and Spain is properly understood as part of the Romano-Germanic tradition, also known as the “civil law tradition.” “Within the Western legal tradition, the sub-tradition of the civil law is characterized by a particular interaction in its early formative period among Roman law, Germanic and local customs, canon law, the international law merchant, and, later, by a distinctive response to the break with feudalism and the rise of nation states, as well as by the peculiar role it has accorded legal science.” MARY ANN GLENDON, MICHAEL GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 40 (West 1994).

the rest of the world.¹⁶ In order to understand why the *légitime* endured as it did in Louisiana it is thus necessary to explore the state's historical and cultural particularity within the context of the United States.

B. Louisiana as a Crucible of Latin- and Anglo-America

¶13 From 1699 to 1803, Louisiana was alternately a French and Spanish colony, the primary language of the inhabitants was French, and the laws came directly from French and Spanish sources.¹⁷ In 1803, as a result of the Louisiana Purchase, Louisiana became a part of the United States, but the bulk of the population continued to view itself as a part of the French New World.¹⁸ This perception was sustained by waves of immigration in the late 18th century from French-speaking areas such as St. Domingue (Haiti), former French colonies in Canada, and from France itself.¹⁹ For many decades after statehood, much of the local population did not actively seek integration into American life and through the early decades of the 19th century, Louisiana clung to the laws, language, religion, and social customs of France.²⁰

¶14 Nevertheless, during these same years, Anglo-American settlers poured into Louisiana, and the state's population expanded north and westward away from the New Orleans area. Pressure to "Americanize" the state socially and

¹⁶ See Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 (1996).

¹⁷ For what is perhaps the definitive work on French Louisiana, see MARCEL GIRAUD, *HISTOIRE DE LA LOUISIANE FRANÇAISE* (LSU Press ed., 1974); "Spain legally possessed Louisiana from 1762-1800, and she actually controlled the colony from 1769-1803. . . . But by and large Spain had little lasting influence. The French language, the French approach to religion, the French attitude toward pleasure, and French dietary habits remained dominant, and when the Spaniards had departed, it was almost as if they had not come." J. GRAY TAYLOR, *LOUISIANA* 28 (Norton 1984). French culture won almost a total victory over the Spanish; it would encounter a much more formidable adversary in the Anglo-Americans. *Id.* at 29.

¹⁸ Joseph G. Tregle, Jr., *Creoles and Americans*, in *CREOLE NEW ORLEANS: RACE AND AMERICANIZATION* 131, 141 (Arnold R. Hirsch & Joseph Logsdon eds., 1992).

¹⁹ The surprising tenacity of the '*peuple français*' in the face of '*la pression des populations américains*' appears to be due in large part to two unexpected developments after the change in sovereignty. First, the expulsion of French Saint Domingue refugees from Spanish Cuba in retaliation to Napoleon's invasion of Spain brought some 10,000 French-speaking persons to Louisiana in 1809 and 1810. . . . Second, Louisiana continued to attract white French immigrants in the antebellum years in considerable numbers.

Hans W. Baade, *The Gens De Couleur of Louisiana: Comparative Slave Law in Microcosm*, 18 CARDOZO L. REV. 535, 580-581 (1996).

Discussing the transfer of Louisiana from France to the United States J. Gray Taylor notes, "[t]he people of Louisiana, except for the relatively few Americans there, were not overjoyed by the change of masters. . . . [M]any devout Catholics feared that the Protestant United States would not allow them freedom of religion. In general, the people of New Orleans were not fond of Americans anyway." Taylor, *supra* note 17, at 46-47.

²⁰ See generally, Tregle, *supra* note 18.

politically increased. The American arrivals were English-speaking and Protestant, and it is hardly surprising that they were unwilling to be excluded from social and political influence within the territory of the United States.²¹ In the years leading up to the Civil War, French speakers became increasingly isolated, but the pre-existing Francophone cultural elite had enough influence to prevent the pre-American civil code from being swept aside by American common law.²² The Spanish “parishes” were retained as units of local government, and notwithstanding the use of the common law for criminal law cases, the civil law regime adopted for the state was based on the Napoleonic Code.²³

¶15 Furthermore, although many Protestant Anglo-Americans came into Louisiana during this time, other immigrants also flowed into the state. As a great port, New Orleans received migrants similar to those arriving in other American coastal cities. While immigrants continued to arrive from France and Canada, others also came from Germany and Ireland.²⁴ Later, Italians, and Yugoslavs joined them.²⁵ One significant fact about most of these immigrants was that they were Catholic.²⁶ Unlike immigrants arriving in other parts of the United States, who were often met with anti-Catholic bigotry and social marginalization, New Orleans and Louisiana offered a city and state with an established, socially dominant, Catholic population.²⁷

¶16 Ultimately, and particularly after the Civil War, the state of Louisiana took on a certain dual identity.²⁸ The northern part of the state became quite similar culturally to the rest of the American South – the white population spoke English;

²¹ For several decades after 1803 the history of New Orleans and Louisiana centered largely in vigorous battle among Latin creoles, Americans, and foreign French for control of the society, each group determined to mold the whole to its particular design. Issues dividing the factions ran so deep that those involved in the contest not unreasonably thought of themselves as engaged in a struggle for the very soul of the community.

Supra, note 18 at 141.

²² Symeon C. Symeonides, *Introduction to the Romanist Tradition in Louisiana: One Day in the Life of Louisiana Law*, 56 LA. L. REV. 249, 253-254 (1995).

²³ Taylor, *supra* note 17, at 48-49.

²⁴ Germans in particular, as well as small groups of Irish settlers, had been an important part of Louisiana under the French and Spanish. German farmers are often credited with saving the colony from starvation in the 1720s and they were an integral part of colony's white population. JOHN WILDS ET AL., *LOUISIANA, YESTERDAY AND TODAY: A HISTORICAL GUIDE TO THE STATE* 23-25 (LSU Press 1996); *see also* Giraud, *supra* note 17, Vol. V, at 266-267. By 1810, there was a notable Irish presence, and ultimately, New Orleans became a major port of entry for European immigration to the United States. Wilds, *supra* note 24 at 28-29.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Taylor, *supra* note 17 at 158-62.

was ethnically English, Scottish and Scots-Irish; and was religiously Protestant.²⁹ The African-American population, made up in large part of the descendants of slaves brought from other parts of the United States, was also primarily Protestant and Anglophone.³⁰ Immigration directly from Europe to this area was minimal. South Louisiana, on the other hand, had a much more polyglot character, but its diversity was more ethnic than religious.³¹ Large numbers of European immigrants joined a significant population of American blacks, former *gens de couleur libres*,³² American migrants, and the long established white descendants of the French- and Spanish-era colonials.³³ Apart from the American migrants, most of this population, black and white, was Catholic. Much of the population, black and white, spoke French or a Creole French *patois*.³⁴ These differences produced a deep cultural division within the state that had important effects on the political environment.³⁵ Reconstruction, post-Civil War poverty, entrenched racism, and general social unrest gave the Anglo-Americans more social and political power, and once the Reconstruction attempts at racial equality collapsed, pressure became more intense to conform Louisiana's laws and social practices

²⁹ *Id.*

³⁰ *Id.*

³¹ "Free people of color."

³² These people are generally known today as Creoles, and have been a significant group in the population of south Louisiana throughout the state's history. The virulent racism of late 19th and early 20th century American culture caused "white" Louisianans to assert that the term Creole applied solely to "pure white" descendants of Louisiana's early European settlers. This claim has generally been dismissed as ahistorical by modern scholars, and seems in retrospect to be an effort by certain New Orleans elites to "sanitize" the reality of a high tolerance for interracial intimacy in the culture of French and Spanish Louisiana. The term "Creole" most correctly identifies those groups in the population that trace their roots to the Latin culture of the French and Spanish colonial experience. What is particularly significant about the non-white Creoles is that they were francophone Catholics, sharing family names, culture, and lineage with the "white" francophone community. This creation of a mixed-race, "creole" community was a common cultural phenomenon in the French, Spanish, and Portuguese colonies of the Americas. See generally, Tregle, *supra* note 18.

³³ *Id.*

³⁴ *Id.*

³⁵ On the importance of the North Louisiana/South Louisiana cultural divide in the political career of Huey Long, see generally, Taylor, *supra* note 17, at 158-162.

with the rest of the South.³⁶ Yet, despite the pressure of ever-increasing Americanization, the state was able to maintain its civil law tradition.

¶17 Louisiana's elites were primarily products of the southern part of the state, which was the main area of original colonial settlement, where most of the largest cities were located, and home to most of the state's people.³⁷ Affection for the civil law, however, was not simply a nostalgic peculiarity of the upper-classes.

³⁶ One prime example of the Anglo-Americans influence in Louisiana life after the Civil War was the transition from a more fluid system of racial relations and classifications, common in the Caribbean and Latin America, to a Jim Crow, black/white racial dichotomy prevalent in English-speaking North America.

[T]he Americanization of New Orleans was more than just a struggle between Americans and creoles. It also involved, for nearly a century, the curious coexistence of the three-tiered Caribbean racial structure alongside its two-tiered American counterpart in an ethnically divided city. Only the transformations wrought by massive European immigration, and a brutal Civil War assured the disappearance of the city's traditional, if unorthodox, racial order.

ARNOLD R. HIRSCH & JOSEPH LOGSDON, in *CREOLE NEW ORLEANS: RACE AND AMERICANIZATION*, *supra* note 20, at 189-90. Observers from other parts of the South were often shocked at the level of interracial intimacy in New Orleans. Historian John Blassingame has written that the influence of Catholicism and extensive interracial sexual contacts created a more tolerant and nuanced racial atmosphere in 19th century New Orleans than in the rest of the American South.

Nothing is more indicative of the strange twists and turns which the color line took in New Orleans than the sexual intimacy between whites and blacks. In this area, as in many others, Latin practices belied Anglo-Saxon ideology. This is not to say, of course, that there was no painful discrimination against Negroes in public institutions and social relations. . . . In New Orleans, as perhaps in no other American city, there were many cracks in the color line. Negroes frequently interacted on terms of perfect equality with whites in public institutions and in social relations. Jim Crow did not erect a monolithic barrier between the races; instead, race relations in the city presented a very complex and varied pattern of complete, partial, or occasional integration and intimacy in several areas.

JOHN BLASSINGAME, *BLACK NEW ORLEANS* 210-211 (University of Chicago 1973).

³⁷ In this Article, I will rely on an understanding of the role of elites that was developed by the sociologist Edward Shils. Sociologists have defined "society" as "the outermost social structure for certain groups of individuals who, whatever might be their attitude toward it, view themselves as members and experience their identities as being determined by it." L. Greenfield & M. Martin, *The Idea of the Center: An Introduction*, in *THE CENTER: IDEAS AND INSTITUTIONS* viii (L. Greenfield & M. Martin eds., University of Chicago 1988). Shils uses the concept of the center to locate (1) the central system of values in a society and (2) the institutions and persons who embody the value system. *Id.* at ix-x. Generally, various types of elites occupy the center. "The center exercises authority and power; it also espouses and embodies beliefs about things thought to be of transcendent importance, that is 'serious.'" Edward Shils, *Center and Periphery: An Idea and its Career*, in *THE CENTER: IDEAS AND INSTITUTIONS*, *supra* at 251. Prior to 1803, and for a time thereafter, Louisiana's cultural center was occupied by a French-speaking Creole planter and commercial elite, and the Catholic Church. By the Civil War, the Creole elite were being pushed aside by Anglo-Americans, and the Catholic Church was competing for influence with Protestant religious and cultural values.

There was strong grass roots support for the civil law in the Catholic south.³⁸ Many of the rural people in south Louisiana continued to speak French as their only language until World War II, and they were comfortable with the legal system being controlled by civil law-trained (and often French-speaking) lawyers and judges.³⁹ Many recent immigrants, who were also concentrated in south Louisiana, were accustomed to living under the civil code tradition and saw no reason to change.⁴⁰ History, language, religion, geography, ethnic heritage, and social customs all served to separate south Louisiana culturally from north Louisiana, as well as from the rest of the South and much of the United States.

¶18 In the early 20th century a campaign began to introduce the common law device of the trust into Louisiana law.⁴¹ One possible use of the trust would have

³⁸ See GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* 11-19 (Harvard University Press 1975).

³⁹ See generally, SHANE K. BERNARD, *THE CAJUNS: AN AMERICANIZATION OF A PEOPLE* (University of Mississippi Press 2003).

⁴⁰ A popularized version of the idea that the “common man” in south Louisiana had a basic understanding and affection for the Louisiana Civil Code, and that New Orleans and south Louisiana existed as world apart from the rest of the American South, can be found in Tennessee Williams’ play, *A Streetcar Named Desire*. Stanley Kowalski, the male protagonist, is a New Orleans working-class everyman, with his Polish name immediately identifying him as a character foreign to the culture of the inland South (where his wife and sister-in-law are from), but integral to polyglot New Orleans. When Kowalski begins to suspect that his wife may have inherited an old plantation property, he confronts her in the following exchange:

Stanley: Listen, did you ever hear of the Napoleonic Code?

Stella: No, Stanley, I haven’t heard of the Napoleonic Code.

Stanley: Let me enlighten you on a point or two.

Stella: Yes?

Stanley: In the State of Louisiana we have what is known as the Napoleonic Code according to which what belongs to the wife belongs to the husband also and vice versa.

TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* act 1, sc. 2, 22 (Dramatists Play Service, Inc. 1952) (1947). This idea that the law should be accessible to all citizens was one of the purposes underlying the creation of the Napoleonic Code, which was originally entitled, *Le Code Civil des Français* – The Civil Code of the French People – by Napoleon.

Indeed, a civil code should be so well-written – not drafted – that even the layman reader should be able to recognize that the legal regime described there conforms to and reinforces an order consistent with a proper understanding of the relation of human beings to each other in the ontological order consistent with the culture of the people and the physical environment in which they live.

Robert A. Pascal, *The 26th John M. Tucker, Jr. Lecture in Civil Law: Of The Civil Code and Us*, 59 La. L. Rev. 301, 302 (1998).

⁴¹ A trust is a mechanism for the separation of ownership of property from its beneficial use. It rests title to the property in question in a trustee to use the property for the benefit of one or more beneficiaries. THOMAS L. SHAFFER & CAROL ANN MOONEY, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS*, 99-100 (Foundation Press 1991).

been to exclude assets from an estate for the purpose of diminishing the size of the *légitime*.⁴² In 1920, legislation was passed to allow assets placed in trust to be exempt from the forced heirship laws.⁴³ Devotion to traditional civil law principles was still so intense at that time that in 1921, the state constitution was amended in an effort to prevent future laws from being passed that would abolish forced heirship.⁴⁴

¶19 The debate over trusts thrust Louisiana somewhat belatedly into a longstanding American debate about whether it was appropriate for a testator to exercise restraints on the use of property once it had been devised, also known as “dead hand control.”⁴⁵ In describing the theoretical bias of American property law, Gregory Alexander has remarked:

The law of property is usually regarded as the province of individualism and autonomy. It is certainly true that during the nineteenth century the main doctrines of property law, strictly so called, favored the consolidation principle [which seeks to concentrate property rights and privileges in one legal entity]. And it is equally clear that the consolidation tendency is consistent with the ideology of individual autonomy. In this sense, then, nineteenth century property law does reflect an ideological bias in favor of atomistic individualism and opposed to social interconnectedness.⁴⁶

¶20 What was less clear, however, was whether the trust as a legal concept promoted or restricted individual autonomy. On the one hand, if the conditions of the trust were strictly observed, the trustor’s freedom of action regarding the use and disposal of property was protected and respected.⁴⁷ On the other hand, restraints on the power of alienation restricted the freedom of the beneficiary to use the trust property as he or she saw fit.⁴⁸ Although this tension was recognized by 19th century American legal thinkers, Alexander has described how it tended to be overlooked or minimized as a reasonable exception to the ongoing process of liberalizing American property law and ridding it of “feudal” restraints on

⁴² See, e.g., *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984).

⁴³ Pascal, *supra* note 39, at 315.

⁴⁴ “No law shall be passed abolishing forced heirship or authorizing the creation of substitutions, fidei commissa or trust estates.” LA. CONST. art. IV, § 16 (amended 1974). The provision goes on to create an exception for the creation of trusts under certain limited circumstances.

⁴⁵ Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 Stan. L. Rev. 1189, 1241 (1984-1985).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

alienation.⁴⁹ Although liberal concepts of freedom and individual autonomy would ultimately prevail as the dominant ideology of American property law, a countervailing protectionist impulse was still quite visible in the nation's legal argument during this time.⁵⁰ Alexander calls these opposing visions "self-determination" vs. "protectionism."⁵¹ Within the perspective of 19th century classical legal thought:

The protectionist perspective recognizes that members of society have an obligation to care for one another, an obligation that does not derive from consent, express or implied, but from the fact of belonging to a social group. . . . The protectionist perspective approves the attempt to use property as the foundation for connecting members of society, rather than separating them, as the Classical synthesis envisioned. . . . The protectionist perspective rejects the imperatives of self-reliance and self-determination.⁵²

¶21 Louisiana's jurists were not only steeped in a legal tradition in which the idea of family community had been ingrained for centuries, they were also the products of the slave and agrarian cultures of the American South, which were dominated by protectionist, hierarchical, and communal visions of social relations.⁵³ Although this vision was distorted of course by the endemic racism of the period, many of Louisiana's legal elites would have seen themselves as working to preserve a more "protectionist" legal and social order in the face of a liberal onslaught from the North.

¶22 In addition to this, by the early 20th century the small farmers of north Louisiana were being influenced by the Populist movement. Although some opponents of the trust may have been resisting the incursion of "foreign," common-law structures into Louisiana's Civil Code, others may have seen the trust as another tool of Northern corporations and banks that would be used to rob small farmers of their land and their livelihoods. At a time when huge disparities of wealth were becoming more entrenched in American life, supporters of the *légitime* rallied around Louisiana's alternative vision:

The most remarkable of the economic principles enunciated in the Civil Code, however, deals with the very current problem of the maldistribution of wealth and its unhealthy accumulation. . . . one of the great purposes of the Code is the prevention of this disease.

⁴⁹ See generally, Alexander, *supra* note 44.

⁵⁰ *Id.* at 1241.

⁵¹ *Id.*

⁵² Alexander, *supra* note 44, at 1248-1249.

⁵³ *Id.*

The strict provisions of the Code governing the right of testamentary disposition, in the institution of the doctrine of forced heirship, and its elaborate provisions insuring equality of heirs, all flow from the same desire of obviating the possibility of the passing of great estates into single hands . . . So primogeniture, entailment, trust, and every other form through which fortunes might be held intact despite death are interdicted by the Civil Code of Louisiana. The agency of death thus performs its normal function: it releases the grasp of the possessor over worldly accumulation. It distributes, vests ownership and the right of untrammelled disposition, breaks up the estate, and thus gives full play to the natural rule expressed in the homely proverb that it is but three generations from shirt-sleeves to shirt-sleeves. Thus the law does not stunt the natural instinct of acquisition nor interfere with the normal desire to accumulate for one's own posterity. It does not seek to confiscate nor to destroy. It simply says to the individual: 'You have no right to retain the dead hand on your fortune.'⁵⁴

¶23 Of course, by itself the *légitime* did not necessarily address the problem of wealth concentration. Although it may have dispersed wealth among individuals, this dispersal would occur within one family. Here again, the importance of a protectionist and communal ethos becomes apparent. In traditional social structures, forced heirship helped to maintain *family* wealth over the generations. If, however, nuclear and extended family relationships are weak, then forced heirship arguably would aid in wealth dispersal. In many cases, jointly held assets could be sold for the highest possible price so that siblings can go their separate ways upon the death of a parent.

¶24 The era following World War II began a new chapter in the story of Louisiana's cultural and legal integration into the rest of the United States.⁵⁵ Due in part to the growth of the oil business and a renewed influx of people from outside of the state that was precipitated by the war, pressure to change the rules and make them more consistent with the rest of the country mounted once again.⁵⁶ For the most part, the arguments for changing forced heirship were based on the idea that the free will and individual needs of the testator should control

⁵⁴ Succession of Louis Lauga, 624 So. 2d 1156, 1160-61 (La. 1993) (citing Joseph Dainow, *The Early Sources of Forced Heirship in Louisiana*, 4 LA. L. REV. 42, 68 n.134 (1941)) (quoting Sidney L. Herold, a delegate to the 1921 Louisiana Constitutional Convention in SIDNEY L. HEROLD, HANDBOOK OF THE AMERICAN ASSOCIATION OF LAW SCHOOLS FOR 1935, 84, 88-89).

⁵⁵ Bill McMahon, *Senate Oks Heirship Bill*, THE ADVOCATE, June 6, 1995, at 1A.

⁵⁶ Max Nathan, Jr., *Forced Heirship in Louisiana: An Assault on the Citadel: A Rejection of Forced Heirship*, 52 TUL. L. REV. 5, 6 (1977).

inheritance decisions, and that the state of Louisiana was imposing an unreasonable burden on testators by forcing them to leave substantial portions of their estates to their children.⁵⁷ Support for Louisiana's "unique" institution continued to remain strong, however, and the protection for forced heirship survived a subsequent revision of the state constitution in 1974.⁵⁸ Yet, important economic and social changes were beginning to weaken its foundations.

C. *The Successful Attack on the Légitime*

¶25 The most recent and, ultimately, successful challenge to the *légitime* began in earnest in 1989. Throughout the 1980s, bills were introduced in the state legislature calling for changes to forced heirship, and, in 1989, an act was passed redefining forced heirs as children under the age of twenty-three or those who are declared legally incompetent (interdicted) or subject to such a declaration.⁵⁹ Although perhaps not a significant change in the eyes of those acculturated to the common law, this revision to forced heirship represented a fundamental break with the ancient civilian tradition of the family community. A testator could now choose to sever a bond that the civil law had always recognized as permanent and unbreakable. In the extreme cases where the civil law allowed for disinheritance; the community, through the action of the legislature, determined the circumstances that justified the severing of basic social relationship. What was a community-based standard had now become a personal choice, based on the desires of the individual testator.

¶26 There was some doubt, however, as to the constitutionality of the act under the revised Louisiana Constitution of 1974.⁶⁰ Indeed, in 1993 it was ruled unconstitutional by the Louisiana Supreme Court in *The Succession of Lauga*.⁶¹ The case made it clear that the only way to modify forced heirship was to repeal the constitutional amendment that had been drafted to protect forced heirship from just this sort of legislative attack, something that could only be done by popular vote. Thus, a huge public relations campaign began in the mid-1990s to repeal the amendment.

⁵⁷ *Id.*

⁵⁸ In 1974, Article XII, Section V replaced the 1921 provision. The replacement Articles stated: "No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinheritance shall be provided by law. Trusts may be authorized by law, and a forced portion may be placed in trust." L.A. CONST. art. XII, § 5 (amended 1996). M. Kelly Lanning Turner, *Recent Developments: Succession of Louis Lauga: Amendments to Forced Heirship Article Violate Louisiana Constitution*, 68 TUL. L. REV. 1390, 1395 (1994).

⁵⁹ 1989 La. Acts 788.

⁶⁰ For a detailed analysis of the constitutionality of the act, see Spaht, *supra* note 15.

⁶¹ *Succession of Louis Lauga*, 624 So. 2d 1156 (La. 1993).

¶27 As early as the late 1970s, intense academic debates had taken place over the continued viability of forced heirship in Louisiana. In one often cited exchange from 1977, Max Nathan and Thomas Lemann presented two contrasting views.⁶² Nathan argued that forced heirship was unsound both in principle and in practice, noting that it was essentially a “primitive kind of socialism,” and describing various ways in which the principle was unsuited to modern life.⁶³ In particular, he contended that (1) state and federal estate taxes made forced heirship unnecessary as a means of breaking up large concentrations of wealth; (2) the geographic mobility of society and the fact that all of the other states in the United States did not use forced heirship made Louisiana’s interest in the policy less compelling; (3) even within Louisiana, various methods (such as *inter vivos* transfers) existed to allow testators to avoid forced heirship; and (4) forced heirship placed unreasonable burdens on a surviving spouse by limiting his or her portion of the marital estate in favor of the children, and this circumstance was particularly burdensome for surviving spouses in second marriages.⁶⁴ Throughout the article, Professor Nathan was critical of what he believed to be an illogical attachment to the past in the retention of forced heirship.⁶⁵ He concluded by arguing for respect for a testator’s judgment about distribution of assets as opposed to reliance on the state:

[W]hen a parent cares enough to write a will, the parent more often than not will know better how to dispose of his property than will the state by imposing an inflexible blanket rule. In other words, while most testators will probably want to preserve equality of heirship, in any given situation the parent himself will generally know better how to distribute his property among his heirs than does the state by making inalterable rules that apply virtually to everyone . . . There is no reason to be afraid of changing forced heirship simply because it has a long and extensive history.⁶⁶

¶28 Lemann replied to Nathan’s criticisms of forced heirship by noting that (1) most common law jurisdictions also had forms of testamentary restrictions that prevented one spouse from disinherit the other; (2) that forced heirship was an ancient principle did not make it obsolete but suggested, on the contrary, that the principle was rooted in certain human truths that have endured despite changing social, political, and economic conditions; (3) geographic mobility and the

⁶² Max Nathan, Jr., *Forced Heirship in Louisiana: An Assault on the Citadel: A Rejection of Forced Heirship*, 52 TUL. L. REV. 5, 6 (1977).

⁶³ *Id.*

⁶⁴ *Id.* at 7-14.

⁶⁵ *Id.*

⁶⁶ *Id.* at 19.

changing nature of wealth do not make the social, moral, and civic principles underlying forced heirship any less compelling than they have been in the past; and (4) the practical and technical problem that have arisen in succession law can be dealt with through judicial or legislative modifications without abandoning forced heirship altogether.⁶⁷

¶29 By the time the media campaign ensued in the mid-1990s to convince the state's voters to reject forced heirship, it was clear that Prof. Nathan's arguments had gained the upper hand. The media debate demonstrated how foreign the cultural concepts underlying the *légitime* had become to the now heavily Americanized society of Louisiana.⁶⁸ Those wishing to eliminate forced heirship appealed to the voters as individuals with potential inheritance problems, problems easily solved if they voted for more testamentary freedom, while the supporters of forced heirship relied on the less resonant concepts of heritage, time-tested tradition, and moral responsibility to children in order to make their case.⁶⁹ The political debate was categorized in the press as one which pitted "property rights vs. family values."⁷⁰

¶30 Opponents of change attacked the attempt to eliminate forced heirship as "morally repugnant"⁷¹ and defended forced heirship as a "'finely crafted compromise' between giving someone complete freedom to dispose of his estate and holding him to family responsibilities."⁷² On the other hand, proponents of testamentary freedom assailed forced heirship as archaic, and out of step with modern conceptions of the role of the state and with the realities of family life.⁷³ For example, the leading newspaper in Baton Rouge editorialized in favor of ending forced heirship by stating:

[F]orced heirship is an anachronism, preventing people who have worked hard all their lives from disposing of the fruits of their labors as they see fit. The vast majority of parents gladly spend a large part of their lives and their incomes rearing their children, and most parents will continue to provide for their children in their

⁶⁷ Lemann, *supra* note 10.

⁶⁸ Kevin McGill, *Forced Heirship Challenged*, THE NEW ORLEANS TIMES-PICAYUNE, Apr. 19, 1995, at A7.

⁶⁹ Bill McMahon, *Senate Oks Heirship Bill*, THE ADVOCATE, June 6, 1995, at 1A.

⁷⁰ *Id.*

⁷¹ *Id.* at 1A (relating comments from State Senator John Hainkel (R-New Orleans) who voted against the amendment despite many calls from constituents in favor of the proposed change.).

⁷² Carl Redman, *Amendment 1: "Rights" vs. Family*, THE ADVOCATE, Oct. 9, 1995, at 1B (quoting Prof. Katherine S. Spaht).

⁷³ Randy McClain, *Heir Un-Apparent*, THE ADVOCATE, Nov. 11, 1995 at 1C; *see also*, *Senate Backs Vote on Forced Heirship*, THE ADVOCATE, May 17, 1995 at 6A.

wills. But they should be able to do so out of love, not because the state tells them they must.⁷⁴

¶31 The general consensus among many opponents of forced heirship was that its abolition would “sen[d] a loud signal that we are no longer this backward state that looks to the laws of our forebears as the way we want to propagate the laws of today.”⁷⁵ The symbol of modernity that proponents of the change sought was not simply a statement against the “ultimate form of (government) intrusion—telling people what they must do with whatever money they have left after the government takes its fair share.”⁷⁶ Rather, as state senator Ron Brun, a Republican from the city of Shreveport in Northwest Louisiana, articulated the goal: eliminating forced heirship expressed a willingness on the part of Louisiana to acknowledge the “modern” sentiment that “our children are entitled to our love. Anything else they can earn for themselves.”⁷⁷

¶32 Given the history of Louisiana, it is no small point that this successful attack on forced heirship was accomplished through the political union of a powerful politician from north Louisiana where, historically, hostility to the civil law tradition was most intense, and a wealthy descendant of an infamous political family from south Louisiana, where support for the *légitime* traditionally had been stronger.⁷⁸ Confronted with powerful political alliances and skeptical public opinion, the traditionalists were unable to hold their ground. In 1995, the people of Louisiana voted to abolish the *légitime* for most descendants by ratifying an

⁷⁴ *Vote to Change Louisiana Heirship Law*, THE ADVOCATE, Oct. 8, 1995 at 12B.

⁷⁵ James Welsh, *Heirship In Louisiana A Test of Wills*, THE NEW ORLEANS TIMES-PICAYUNE, Oct. 31, 1995, at C1.

⁷⁶ *Take Forced Heirship out of the La. Constitution*, THE ADVOCATE, May 1, 1995, at 6B.

⁷⁷ Jack Wardlaw, *Forced Heirship Laws Withstand Senate Challenge*, THE NEW ORLEANS TIMES-PICAYUNE, May 3, 1995 at A8.

⁷⁸ Chalin Perez, whose family controls huge land holdings in oil-rich Plaquemines Parish in South Louisiana, hired a lobbyist and mounted a campaign against the *légitime* when it became clear that he could not disinherit the adult children of his first marriage in order to benefit the children of a second union. James Gill, *Forced Heirship and the Perezes*, THE NEW ORLEANS TIMES-PICAYUNE, Jul. 2, 1989, at BB; Cynthia Samuel, 12 TUL. EUR. & CIV. L.F. 183, 185 (1997). Chalin Perez's father, Leander Perez was an arch-segregationist and the ruthless political boss of Plaquemines Parish for fifty years during the mid-20th century. During the time he controlled the entire political mechanism of Plaquemines Parish, he amassed tremendous wealth for himself and his family through various legal and illegal means. Wilds, *supra* note 24, at 270-271; F. Marcus, *Disinheritance Law Kindles Passion in Louisiana*, N.Y. TIMES, Dec. 1, 1989 at B7.

amendment to the state constitution.⁷⁹ With this amendment, the *légitime* was limited to children twenty-three years of age or younger and the scope of forced heirship was vastly reduced, with the amendment saying specifically that forced heirship was “abolished in this state.”⁸⁰ In 1997, the state legislature adopted a new, comprehensive law of successions, which became effective on July 1, 1999.⁸¹ Why were the opponents successful this time?

¶33 Much of the opposition to forced heirship was rooted in a highly atomized vision of personal identity, as well as a strong libertarian strain in American culture that has long been hostile to communal claims on personal resources that are backed by the power of the state. Additionally, the “archaic” view of family and wealth transmission attacked by the opponents relied on a conception of parenting that also is highly resonant in American culture, one that views children as a temporary responsibility to be discharged as soon as offspring become of age. Lineage, extended family unity, and inter-generational responsibility, all essential cultural underpinnings to the concept of the *légitime*, were dismissed by many as anachronisms from an agrarian past. This narrow view of the family, which I will examine in more detail, is a significant cultural difference between the United States and much of the rest of the world.

¶34 According to the 2000 United States Census data, Louisiana had one of the more stable populations in the United States.⁸² Although out-migration has always been significant, the percentage of its population born in the state is among the highest in the nation, and no state has fewer migrants from other parts

⁷⁹ In 1996, the state constitution was amended to contain the following:

(A) The legislature shall provide by law for uniform procedures of successions and for the rights of heirs or legatees and for testate and intestate succession. Except as provided in paragraph (B) of this Section, forced heirship is abolished in this state.

(B) The legislature shall provide for the classification of descendants, of the first degree, twenty-three years of age or younger as forced heirs. The legislature may also classify as forced heirs descendants of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates. The amount of the forced portion reserved to heirs and the grounds for disinheritance shall also be provided by law.”

L.A. CONST. art. XII, § 5.

⁸⁰ *Id.*

⁸¹ See 1997 La. Acts 1421, 1997 La. Acts 3007.

⁸² Marc J. Perry & Paul J. Mackun, *Population Change and Distribution 1990-2000: Census 2000 Brief*, Report No. C2KBR/01-2 (April, 2001) available at <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>. Ten states had more stable populations than Louisiana during this ten-year period: North Dakota, West Virginia, Pennsylvania, Connecticut, Maine, Rhode Island, Ohio, Iowa, New York, and Massachusetts. *Id.*

of the country.⁸³ The aftermath of Hurricane Katrina has of course led to a dramatic increase in out-migration, but has also reinforced the image of the state as inhospitable to new migrants from elsewhere. More recent data show that the population of Louisiana has declined.⁸⁴ The relative high percentage of native-born residents, combined with a singular history in North America, has given the state a unique culture that draws tourists from around the world, but it has also created an environment that has discouraged economic development and various modern legal reforms. The maintenance of a legal system that is not entirely based on the common law intensifies this sense of distance, and has often had a chilling effect on economic investment from other parts of the United States. In recent years, many cities in Louisiana have attempted to promote themselves as warm-weather retirement destinations in an effort to spur the local economy with money from Northern retirees.⁸⁵ Forced heirship raises many issues for those individuals who choose to retire in Louisiana.⁸⁶ Debates about the relative value of uniqueness versus economic growth have been a central part of Louisiana politics in the post-World War II era, with “modernists” seeking economic development sparring with “traditionalists” who sought to preserve the state’s unique legal and cultural heritage. The view that the civil law tradition has hampered Louisiana’s economic development ignores the obvious examples of nations around the world that have moved into the modern economic era while retaining civilian legal systems, although to be fair it may simply recognize the untenable position of an American state attempting to retain “foreign” legal traditions in a period of intense domestic economic integration and federal bureaucratic centralization.

¶35 As an integral part of the United States, it is not particularly surprising that Louisiana has been compelled over time to adapt to the broader legal and cultural realities of the nation of which it is a part. American cultural influence, however, is also quite pervasive beyond the borders of the United States, and the pressure to conform to American legal and cultural norms affects nations around the world, particularly as the United States asserts its status as the globe’s preeminent

⁸³ Blaine Harden, *Born on the Bayou and Barely Felling any Urge to Roam*, N.Y. TIMES, Sept. 30, 2002, at A1.

⁸⁴ See U.S. Census Bureau: *State and Country QuickFacts*, <http://quickfacts.census.gov/qfd/states/22000.html> (last visited Jan. 28, 2009).

⁸⁵ See generally, “Retire in Louisiana” <http://www.retirelouisiana.org/> (last visited Jan. 29, 2009).

⁸⁶ See generally, JOHN E. SIROIS, LOUISIANA RETIREMENT AND ESTATE PLANNING (Financial Publishers LLC 2007).

economic and military power.⁸⁷ As the United States promotes its version of democratic government and free market capitalism, there is bound to be resistance to cultural values that are an implicit part of this package.⁸⁸ This is obvious to people around the world in ways that may not be obvious to many people in Louisiana. It is not unreasonable to expect that there will be foreign resentment and resistance to certain hegemonic tendencies of American law and culture, if not outright rejection of the social costs and cultural assumptions of the American economic and political paradigm.⁸⁹

III. FORCED HEIRSHIP - A WEED IN THE GARDEN OF THE UNENCUMBERED SELF

¶36 The rootedness of many of Louisiana's elites in a cultural context heavily influenced by Catholicism may be another reason the *légitime* endured for as long as it did, and also sheds light on certain important differences between the Latin- and Anglo-American visions of the individual in society that were relevant in the development of succession law. Catholics believe that the individual is inherently social, and that human dignity cannot be separated from life in community with others.⁹⁰ This socially situated view of the human person was well established in Catholic theology by the time of French and Spanish colonial expansion into the Americas. In the Louisiana Digests of 1808 and the Louisiana Civil Code of 1825, substantive Spanish law was translated into French and English using the French Civil Code of 1804 as an organizational model.⁹¹ Robert Pascal has

⁸⁷ In JOHN GRAY, *FALSE DAWN* (Granta Publications 1998), John Gray describes the United States as fiercely (and uniquely) committed to a project of universal civilization based on the global free market. *Id.* at 100. In the process, the United States is “detaching itself from other ‘western’ cultures in the extremity of its experiment in free-market social engineering.” *Id.* at 103.

To accept that countries can achieve modernity without revering the folkways of individualism, bowing to the cult of human rights, or sharing the Enlightenment superstition of progress toward a world civilization, is to admit that America's civil religion has been falsified. For most Americans such a perception is intolerable. Instead, evidence of superior economic growth, savings rates, educational standards and family stability of countries that have repudiated the American model will be repressed, denied and resisted indefatigably. To admit this evidence would be to confront the social costs of the American free market. The free market works to weaken social cohesion. Its productivity is prodigious; but so are its human costs.”

Id. at 131.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ “For by their innermost nature men and women are social beings; and if they do not enter into relationships with others they can neither live nor develop their gifts.” *Pastoral Constitution on the Church in the Modern World, Gaudium et spes*, ¶12, in VATICAN COUNCIL II: CONSTITUTIONS, DECREES, RESOLUTIONS, 175 (Austin Flannery, O.P. ed., Costello Publishing 1996).

⁹¹ Pascal, *supra* note 39, at 302.

indicated that the general principles and norms underlying the Spanish law of that era drew explicitly on Catholic principles grounded in the idea of natural law:

The Digest of 1808, the Civil Code of 1825, and the Revised Civil Code of 1870 as enacted all defined ‘equity’ as an appeal to ‘natural law,’ ‘reason,’ or ‘received usages.’ The text came into existence for us with the Digest of 1808, which, it is to be remembered, was a digest of the Spanish law in force. It should be correct, therefore, to assume that “natural law” was assumed to have the meaning attributed to it in Spain, [containing] judgments about proper human order both consistent with Spanish culture and based on the understanding that all men ontologically-by creation-form a community of mankind under God and, being a community, are obliged morally to respect each other and to live and act cooperatively with each other for the common good.⁹²

¶37 Even though the legal concept of a permanent, interdependent community grounded in marriage and the lineal family came to French and Spanish law from “pagan” Roman and Germanic tribal sources, this concept is consistent with the theology of the human person developed by Augustine and Thomas Aquinas that saw the love of others in community as central to an appropriate love of God.⁹³ The Church was intimately involved in legal rules relating to the family in Spain and pre-Revolutionary France, and would no doubt have been supportive of legal rules that recognized the permanence of marriage and family bonds.⁹⁴ The

⁹² *Id.* at 308.

⁹³ For a general discussion on the development by Aquinas and Augustine of the concept of Christian love as love of self in community with others, *see generally*, Gregory Baum, *Theological Reflections on the Catholic Ethic*, in JOHN E. TROPAN, *THE CATHOLIC ETHIC AND THE SPIRIT OF COMMUNITY* 193, 198-199 (Georgetown 2002). “Love of God and community summons the believer to be selfless and self-sacrificing, forgetting oneself in the worship of God and service of the neighbor, yet hoping that in this love one will find one’s own fulfillment, joy, and happiness.” *Id.* at 199.

⁹⁴ *Id.*

centrality of family remains an important part of modern Catholic social thought.⁹⁵

¶38 Notwithstanding the importance of Catholicism in its cultural life and its ties to Latin America, Louisiana today is fundamentally an Anglo-American place, integrally part of the social and political currents of the greater United States. More than anything else, it was the inability of the dominant strains of modern American liberalism to embrace concepts rooted in permanent bonds or communal identity that destroyed forced heirship. Michael Sandel has noted:

[T]he liberal attempt to construe all obligation in terms of duties universally owed or obligations voluntarily incurred makes it difficult to account for civic obligations and other moral and political ties that we commonly recognize. It fails to capture those loyalties and responsibilities whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are—as members of this family or city or nation or people, as bearers of that history, as citizens of this republic. Loyalties such as these can be more than values I happen to have, and to hold, at a certain distance. The moral responsibilities they entail may go beyond the obligations I voluntarily incur and the “natural duties” I owe to human beings as such.⁹⁶

¶39 In his book *Rational Dependent Animals*, Alasdair MacIntyre argued that the development of human beings as practical reasoners, an essential element of our identity as human persons, requires the good of each being pursued in the context of the good of all those with whom one exists in relationship:

For we cannot have a practically adequate understanding of our own good, of our own flourishing, apart and independently of the flourishing of that whole set of social relationships in which we have found our place. Why not? If I am to flourish to the full

⁹⁵ In *Gaudium et Spes*, the Second Vatican Council devoted extensive discussion to marriage and the family:

[T]he family is the foundation of society. In it, the various generations come together and help one another to grow wiser and to harmonize personal rights with other requirements of social life. All those, therefore, who exercise influence over communities and social groups should work efficiently for the welfare of marriage and the family. Public authority should regard it as a sacred duty to promote their authentic nature, to shield public morality, and to favor the prosperity of domestic life. . . . Christians should actively promote the values of marriage and the family, both by the example of their own lives and by cooperation with other men of good will.

Gaudium et Spes, *supra* note 90, at 226.

⁹⁶ MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT* 14 (Harvard, 1996).

extent that is possible for a human being then my whole life has to be of a certain kind, one in which I not only engage in and achieve some measure of success in the activities of an independent practical reasoner. . . . Each of us achieves our good if and insofar as others make our good their good by helping us through periods of disability to become ourselves the kind of human being – through acquisition and exercise of the virtues – who makes the good of others her or his good. . . . To participate in this network of relationships of giving and receiving as the virtues require, I have to understand that what I may be called upon to give may be quite disproportionate to what I have received and those to whom I may be called upon to give may well be those from whom I shall receive nothing.⁹⁷

¶40 But this is an understanding of the good that American jurisprudence, rooted as it is in the philosophical tradition of liberal social contract theory, does not, or cannot, embrace. Martha Nussbaum has argued that although social contract theory has been a powerful theoretical tool for promoting the expansion of social justice in the Western tradition, it has been unable to solve some key problems, such as how to extend justice to the mentally and physically disabled, and how to ensure justice for all the world's peoples without relying on the boundaries and limitations of legal systems and justice principles tied to the nation-state.⁹⁸ What Nussbaum's inquiry helps reveal is the dramatic effect social contract theory's emphasis on individual autonomy exerts on law and politics:

Doctrines of the social contract have deep and broad influence in our political life. Images of who we are and why we get together shape our thinking about what political principles we should favor and who should be involved in their framing. The common idea that some citizens "pay their own way" and others do not, that some are parasitic and others "normally productive," are the offshoots, in the popular imagination, of the idea of society as a scheme of cooperation for mutual advantage.⁹⁹

¶41 The cultural, legal, and political battles over forced heirship in Louisiana are indicative of the difficulty one faces when attempting to promote legal rules that rely on obligations that were not freely chosen, but spring from communal relationships or deeply personal understandings of who we are or where we belong. Louisiana's stable population, unique legal system, and strong Catholic traditions meant that philosophical traditions beyond social contract theory informed discussions about law and public policy, which allowed forced heirship

⁹⁷ ALASDAIR MACINTYRE, *RATIONAL DEPENDENT ANIMALS*, 107-108 (Chicago: Open Court Press, 1999).

⁹⁸ *Id.*

⁹⁹ *Id.*

to remain in place in the legal system until the end of the 20th century. By that time, however, the debates over forced heirship in the academy and in the press had begun to demonstrate that the unencumbered individualism of American liberalism had become a dominant feature of lives of most Louisianans.

¶42 Until recently, Louisiana existed as a marginal cultural community within the broader culture of the United States. Strong historical ties to its past allowed its legal system to retain a coherent understanding of concepts of ownership and testation that were linked to its cultural and historical past. But as Alasdair MacIntyre has also noted:

In such communities the need to enter into public debate enforces participation in the cultural *mélange* in the search for a common stock of concepts and norms which all may employ and to which all may appeal. Consequently, the allegiance of such marginal communities to the tradition is constantly in danger of being eroded. . . . We have all too many disparate and rival moral concepts, in this case rival and disparate concepts of justice, and the moral resources of the culture allow us no way of settling the issue rationally.¹⁰⁰

¶43 It is important to recognize how far outside of the mainstream of American testamentary law Louisiana was with the pre-1999 *légitime* and how far outside the mainstream it remains with respect to the testamentary rights of children. In the other 49 states of the union, a testator has almost unlimited freedom to disinherit adult children, and minor children are increasingly subject to disinheritance.¹⁰¹ In an eloquent defense of the tradition of the *légitime* in Louisiana, Professor Katherine Shaw Spaht wrote:

Forced heirship, an institution tested through the ages, remains a sound social policy to date because it helps preserve and strengthen the family by reminding parents of their societal responsibilities and by binding family members together throughout life and beyond. . . . [O]ther states are now beginning to realize that the rampant disintegration of the family is not unrelated to legal institutions that promoted a selfish individualism by glorifying the unrestricted freedom of testation.¹⁰²

¹⁰⁰ ALASDAIR MACINTYRE, *AFTER VIRTUE* 252 (2d edition, Notre Dame 1984).

¹⁰¹ Professor Brashier argues that the disinheritance of minor children is a serious and growing problem in the United States, particularly given the huge numbers of divorces and non-marital births. *See generally, Brashier, supra* note 2, at 9-12.

¹⁰² Katherine Shaw Spaht, *Forced Heirship Changes: The Regrettable Revolution Completed*, 57 LA. L. REV. 55, 58 (1996).

¶44 In Louisiana, at least until 23 years of age, a child's right to the *légitime* can be defeated only if there is "just cause" to disinherit.¹⁰³ Even with the changes to the *légitime*, Louisiana remains the *only* state in the United States that provides children under age 23 with direct protection from disinheritance.¹⁰⁴ Unfortunately, the new limitations on forced heirship suggest that this contribution to American family law may be threatened as Louisiana is absorbed into mainstream American cultural thinking about the individual's responsibilities to others. In an article comparing the American system of inheritance to a model in the Canadian province of British Columbia, Ronald Chester asked:

[W]hy does the United States, nearly alone among modern nations, allow parents to disinherit their children? Although a number of reasons, might be proffered, the answer is most likely to be found in Americans' extreme tolerance for individual control over property, even after death. Neither children nor the family appear to be held in high enough esteem to overcome this desire for individual control.¹⁰⁵

¶45 Although Chester believes that this situation in American law is "bad for the family, bad for society, and that it should be remedied," he prefers the common law system of judicial discretion over forced heirship as the best way to correct this problem.¹⁰⁶ Nevertheless, he has no trouble identifying one source of the disinheritance problem as a disturbing individualism that places more value on the desires of the dead than the needs of children.¹⁰⁷ On the other hand, some other recent scholarship in this area argues that American law inappropriately favors the traditional family in inheritance, and ignores the new realities of modern relationships. For example, Frances Foster contends that American inheritance law is locked in a "family paradigm" that "define[s] people by family categories."¹⁰⁸ Decedents and their survivors remain first and foremost spouses, parents, children, and siblings rather than individuals with particular human needs and circumstances that increasingly defy conventional family norms."¹⁰⁹

¹⁰³ See generally, Max Nathan, Jr., *The Unheralded 'New' Disinheritance Rules*, 74 TUL. L. REV. 1027 (2000).

¹⁰⁴ Brashier, *supra* note 2, at 1.

¹⁰⁵ Ronald Chester, *Disinheritance and the American Child*, 1998 UTAH L. REV. 1, 2 (1998); see also RALPH BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 103-105 (Temple University 2004).

¹⁰⁶ *Id.* at 3.

¹⁰⁷ *Id.*

¹⁰⁸ Frances Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 201 (2001); see also Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

¹⁰⁹ *Id.*

¶46 Foster agrees with most commentators that “donative freedom is the principle value of the American system of inheritance,” but she argues that this principle is often rejected in practice by judges and juries who impose their implicit preference for traditional family relationships when reviewing bequests.¹¹⁰ Extended family members, care-givers, and non-related individuals who had intimate or close personal relationships with the decedent, tend to be excluded from intestacy regimes or are in an extremely precarious position if a will is challenged by traditional blood heirs.¹¹¹ Foster surveys several ways in which the inheritance system might be reformed, but concludes with the fundamental idea that the major problem with current law in this area is a family paradigm that

is so inflexible, outdated, and culturally biased that it harms all touched directly or indirectly by the inheritance system. . . . [B]y imposing a single version of “natural” wealth distribution, the family paradigm sends a broader message to society that devalues ethnic, cultural, and individual differences.¹¹²

Although not critical of the family *per se*, Foster still rejects the idea that the law should give a preferential position to traditional family relationships when dealing with inheritance.

¶47 Foster’s criticisms reveal another weakness in the concept of donative freedom as it has developed in American law. The Anglo-American system provides room for judicial discretion when a will is challenged. Interestingly, Chester would like this discretion to be expanded to protect children and Foster seeks to have it restrained to prevent cultural bias. In some cases, doctrines such as undue influence, mistake, and incompetence can allow judges to override the objective intentions of a testator, at least as expressed in writing in a will. But successful use of these doctrines is relatively rare, which is as it should be if the legal system is to maintain a coherent policy of relying on objective evidence as the best expression of an individual testator’s intentions. The question must also be asked whether ad hoc decision-making by judges to modify a testator’s intent is a good idea in these circumstances. As Foster argues, ad hoc judicial discretion often leads to an imposition of the will of the decision-maker, based on his or her cultural preferences or prejudices. As an alternative, the *légitime* offers a bright line default rule typically imposed statutorily. Although it favors direct descendants and limits the freely disposable portion of an estate, it does not prevent a testator from making alternative arrangements with the disposable portion, such as *inter vivos* gifts, nor does it prevent the legislature from

¹¹⁰ Foster, *supra* note 110, at 209.

¹¹¹ *Id.* at 209.

¹¹² *Id.* at 271-72.

increasing or decreasing the disposable portion as social conditions change or if there is a broadly held perception that individuals lack sufficient control over the disposal of their estates.

¶48 Depending on one's opinion, the wide-ranging discretion given to judges in American common law is an inherent strength or weakness of the system. The courts tend to respond most quickly to the needs of cultural elites, who are most likely to bring lawsuits demanding changes in the traditional view of a legal rule (or to resist change when they feel important interests of theirs are threatened), and from whose ranks members of the judiciary are most often drawn. As America's wealthy and powerful have become more accepting of non-traditional social arrangements, there has been a corresponding pressure on the legal system to allow more liberal transfers of wealth through inheritance.¹¹³ Indeed, America's elites have worked tirelessly to push poor, working-class, and "middle" Americans toward more "enlightened" views regarding individual freedom. As Christopher Lasch noted in *The Revolt of the Elites*, American professional and managerial elites have become obsessed with personal health and welfare for individuals, while at the same time seeking to "extend the range of personal choices in matters where most people feel the need of solid moral guidelines."¹¹⁴ What this cultural climate and brief review of current academic discussions of American testamentary law reveal is that the role of the family in American life is contested, and it is impossible to craft coherent legal rules when a society does

¹¹³ Arguably, the modern American social elite, who are defined more by their wealth than by their values, are well on their way to a complete rejection of some of the most basic traditional understandings of marriage and family, even going so far as crafting prenuptial agreements prohibiting the bearing of children. The *New York Times*, generally understood as a primary source of news and cultural trends for the most privileged members of American society, recently ran a prominent story on this growing trend among the nation's wealthy men, many of whom marry multiple times. After divorcing their first wives (who are often the mothers of their children) in middle-age these men often marry women significantly younger than themselves. These later marriages are increasingly subject to prenuptial contracts in which the new wives specifically agree not to bear children, or to accept drastic financial consequences if they do. Some legal experts have argued that these contracts are unenforceable, but American family law is subject to dramatic variations from state to state, which makes such predictions difficult. See Jill Brooke, *A Promise to Love, Honor, and Bear No Children*, N.Y. TIMES, Oct. 13, 2002 at 1C.

¹¹⁴ CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES* 28 (W.W. Norton 1995).

not agree on a shared narrative about the role of fundamental institutions in its communal life.¹¹⁵

¶49 It would be dismissive of any meaningful understanding of human dignity to ignore the reality of the breakdown of traditional bonds of kinship in many modern societies, particularly in North America and Europe. Yet, it is hard to imagine a concept more basic to human civilization than the bond between parent and child, and as a legal concept, the *légitime* sets a certain standard for the consequences that flow from such an important relationship. In the typical case, parents care for children until adulthood, but the relationship does not end there. As health care improves and life spans increase, more and more people spend a significant portion of their adult lives caring for elderly parents. At the same time, more elderly people than ever find themselves serving as the primary, or even sole, caretakers of their children's children. The *légitime* assumes the kind of inter-generational sharing of resources that tends to occur anyway, a sharing that often relieves the state of significant social service burdens.

¶50 Exceptions to the principle of forced heirship were created to account for instances in which the parent-child bond was likely to have been irretrievably broken, and there is nothing to prevent legislatures from modifying those exceptions to reflect changing social conditions. By mandating a forced share of a parent's estate for children, the state removes the courts from the innumerable complex issues that tend to surround the death of a parent, except in those cases in which the status of an heir is challenged under an exception to the rule. It also eliminates the uncertainty of how judicial discretion might be applied in a given case. Furthermore, by limiting exceptions to the rule to uncommon situations requiring a fairly drastic response, the community is able to acculturate itself to the existence of a universally applied legal standard that assumes strong ties between parents and children.

IV. CAN A SOCIALLY SITUATED VIEW OF THE INDIVIDUAL SURVIVE IN AN AMERICAN IMPERIUM?

¶51 One key philosophical assumption underlying the American understanding of liberal democracy is that human dignity is grounded largely in personal autonomy, and that the "society is united around a strong commitment to treat

¹¹⁵ Alasdair MacIntyre has described aptly the state of moral argument in American culture and sheds light on the state of discussions of the family in American society:

It is precisely because there is in our society no established way of deciding between [competing] claims that moral argument appears to be necessarily interminable. From our rival conclusions we can argue back to our rival premises; but when we do arrive at our premises argument ceases and the invocation of one premise against another becomes a matter of pure assertion and counter-assertion.

ALASDAIR MACINTYRE, AFTER VIRTUE 8 (2d Edition, Notre Dame, 1984).

people with equal respect.”¹¹⁶ Michael Sandel has described the United States as a society in which:

[T]he main motifs of contemporary liberalism – rights as trumps, the neutral state, and the unencumbered self – figure with increasing prominence in our moral and political culture. . . . Even the institutions of marriage and the family are increasingly conceived in voluntarist terms, prized less for the human goods they make possible than for the autonomous choices they express.¹¹⁷

¶52 Charles Taylor has noted further that “irreducibly social goods,” such as relationships built on love and trust, cannot be properly understood as assemblages of the goods or preferences of individuals, and that attempts to reduce these social goods to the sum of the benefits they provide individuals is misplaced.¹¹⁸ For Taylor, the good that a family provides to its members and to the society at large is “undecomposable,” and the benefits of family extend beyond what is provided to individual family members as each of them perceives it because of the creation of a “common understanding:”

Common understandings are undecomposable. This is because . . . it is essential to their being what they are that they be not just for you and just for me, but for us. That we have a common understanding presupposes that we have formed a unit, a “we” who understand together, which is by definition analytically undecomposable. If it were, the understanding would not be genuinely common. A relation of friendship is an example of one which reposes on a common understanding around this, that our friendship is valuable. . . . Here is another way, then, that a good can be social in an irreducible fashion: where it is essential to its being a good that its goodness be the object of a common understanding.¹¹⁹

¶53 The atomistic liberalism that now dominates so many aspects of American life is increasingly incapable of recognizing the value of undecomposable social goods. Respect for individual autonomy in American law means that the state cannot insist on the maintenance of any social or relational good when one individual in the relationship no longer finds it satisfying, nor can it deny the

¹¹⁶ Taylor, *supra* note 1, at 245 (explaining the triumph of the vision of liberalism outlined by thinkers such as Ronald Dworkin and John Rawls among the elites in the English-speaking world).

¹¹⁷ Sandel, *supra* note 96, at 108.

¹¹⁸ Taylor, *supra* note 1, at 139.

¹¹⁹ *Id.*

opportunity for individuals to create at-will relationships they believe promote their individual well-being. Catholic theologian David Hollenbach has argued that Americans have developed a highly privatized view of the good life which:

Suggests that those aspects of life under the power of personal freedom are more important to most Americans than those determined by social contexts or historical contingencies. . . . It puts the quality of public life low on the scale of goods and directs attention away from goods that can only be realized in the shared life of the larger society. Thus it devalues the common good and directs attention away from the common conditions of public life.¹²⁰

But, as Hollenbach later demonstrates through various examples, there are “problems tolerance cannot handle.”¹²¹

¶54 This privatized, atomized, and tolerant culture has proved a fertile breeding ground for an aggressive, consumer-driven version of free market capitalism. It is hardly an exaggeration to say that the United States has become a country devoted to the creeds of consumption and consumerism.¹²² Much of our public discussion is focused on the economy, and many of our major public policy choices are cast in market terms. Increasingly, the United States has become a society not of citizens, engaged with one another in the process of democratic governance and the pursuit of common goals, but of consumers, bound together in their individual, yet similar, quests for economic advancement and material acquisition. In Taylor’s terms, American society draws its unity from convergent interests as opposed to common ones, which raises serious questions about the long-term integrity of the American societal model in its current form:

[T]he very definition of a republican regime as classically understood requires an ontology different from atomism. . . . It requires that we probe the relations of identity and community, and distinguish the different possibilities , in particular the possible

¹²⁰ DAVID HOLLENBACH, S.J., *THE COMMON GOOD AND CHRISTIAN ETHICS* 28 (Cambridge 2002).

¹²¹ For instance, domestic issues of race, poverty, and social isolation; international issues such as AIDS, economic globalization, terrorism. *See generally, id.* at 32-61.

¹²² Consumerism names the ethos of the modern market that is at least as inescapable as the state. Thus modern persons are increasingly defined in all of our relationships and endeavors as consumers. We are no longer students, but “educational consumers,” no longer worshipers, but “church shoppers,” no longer patients, but “health consumers,” and so on. Some may brush aside such labels as “mere language,” but language is crucial to any ethos. Language makes all the difference in how we perceive and define the issues of everyday life, and so how we respond to them. RODNEY CLAPP, ED., *THE CONSUMING PASSION* 8 (InterVarsity Press 1998).

place of we-identities as against merely convergent I-identities, and the consequent role of common as against convergent goods.¹²³

This inability of American culture to give public value to social goods has had harsh effects on families and family life. It is hardly surprising to find that American marriages are often transitory and that American children, too weak to promote their own interests, suffer from high rates of poverty.¹²⁴

¶55 There is a growing concern around the world that the United States wants to promote a global, free-market capitalism grounded in this American political and social model, something that many nations find objectively undesirable, inefficient, and ultimately destructive of social cohesion.¹²⁵ For instance, in *L'Illusion économique* [*The Economic Illusion*], French historian Emmanuel Todd wrote a piercing critique of American-style capitalism and cultural atomism.¹²⁶ What was particularly interesting in his analysis, and probably most trenchant, was a body of anthropological and sociological research he cited to argue that the predominate type of family structure in a region can be predictive of the way capitalism will develop in that area.¹²⁷ Todd's analysis provides a compelling link between American family life and the American economic model.

¶56 The attack on the *légitime* in Louisiana lends some support to the view that the concept of a permanent, communal identity grounded in social institutions such as family groups is not a strong social current in American life. American legal rules, economic conditions, political life, and social interactions reflect this

¹²³ Taylor, *supra* note 1, at 192.

¹²⁴ In 2000, the Centers for Disease Control reported that 43% of first marriages in the United States ended in divorce within 15 years, and that divorce is associated with a wide variety of negative health outcomes for men, women, and children. Matthew D. Bramlett & William D. Mosher, *First Marriage Dissolution, Divorce and Remarriage: United States*, Advance Data, Number 323 (May 31, 2001) available at <http://www.cdc.gov/nchs/data/ad/ad323.pdf>. Sixteen percent of American children lived in poverty in 2000, the lowest rate since 1979, but this figure was as high as 22% in 1993 and has fluctuated around 20% over the last twenty years. AMERICA'S CHILDREN 2002: INDICATORS OF CHILDREN'S WELL-BEING, <http://childstats.gov/americaschildren/index.asp>.

¹²⁵ Gray, *supra* note 87. In MICHEL ALBERT, CAPITALISM VS. CAPITALISM: HOW AMERICA'S OBSESSION WITH INDIVIDUAL ACHIEVEMENT AND SHORT-TERM PROFIT HAS LED IT TO THE BRINK OF COLLAPSE (Paul Haviland trans., Four Wall Eight Widows 1993), Michel Albert organizes the triumphant capitalism of the early 1990s into two models: the "neo-American" model based on individual success and short term financial gain and the "Rhine" (or German-Japanese) model based on collective success, consensus, and long-term vision. Albert argues for the superiority of the Rhine model, which he believes is more efficient and equitable.

¹²⁶ EMMANUEL TODD, *L'ILLUSION ECONOMIQUE* (Gallimard 1998). Todd cites Albert and several other European studies of capitalist economies for the proposition that a significant body of academic work supports the view that sociological and anthropological research explains various "cultures" of capitalism. *Id.* at 71-77. Todd draws heavily on the role family structures have played in the development two fundamental categories of capitalism: Anglo-Saxon "individualist" and Germano-Japanese "integrated."

¹²⁷ *Id.*

cultural reality by rewarding individual effort, achievement, and autonomy at the expense of weaker community stakeholders like children, whose needs tend to constrain individual freedom and choice.¹²⁸ Individuals who aggressively and successfully pursue financial gain, material wealth, and self-aggrandizement are widely emulated and admired. But not all societies view these qualities in the positive light that Americans do. As they rush to adapt to the imperatives of the global marketplace, developing countries in particular risk being swept up in a broader wave of cultural “Americanization” before they have had time to consider the broader effects of the process on their ways of life.

¶57 Ultimately, the story of the *légitime* in Louisiana reveals certain values in American culture that play an important role in the maintenance or reform of key legal principles, and it suggests important relationships between the promotion of certain types of liberal values in economic and political life and the weakening of the bonds of kinship, love, and friendship in cultural life. Strong family structures do not serve the interests of a highly mobile, consumer-driven economy or a culture governed primarily by self-referential concepts of personal morality and identity. Weak marriages and loose family commitments fuel the mobility and personal detachment that individuals need in an economy that thrives on short-term profits, materialism, and the unrealistic dream that everyone can become rich. Ties to people are replaced with ties to things, creating a culture that ultimately fails to satisfy real human needs. On the other hand, people with deep family ties or a strong sense of obligation to others often make choices that may not be wealth-maximizing in economic terms or particularly self-satisfying in personal terms because they place more value on commitments to a common understanding of what it means to be a member of a family. Although these choices often come at some cost to an individual’s personal autonomy, maximizing individual choice is not the only way to bring dignity to a human life or to build a just society.¹²⁹

¹²⁸ See discussion, *supra* note 87. The high rate of divorce in the United States and the relatively poor status of American children relative to other groups in the society is not surprising given this cultural predisposition. Sociologist James Coleman argued that since the 19th century, children have moved from the center to the periphery of American cultural life, which in part explains the growing unwillingness of Americans to provide funding for public schools. James Coleman, *The Family’s Move from Center to Periphery, and its Implications for Schooling*, in *THE CENTER: IDEAS AND INSTITUTIONS*, *supra* note 27. Coleman found that approximately two-thirds of American adults live in households without children and that interest in children has declined dramatically during the 20th century, particularly as a growing proportion of the nation’s children has become non-white. *Id.* at 178-79.

¹²⁹ “Rooted families” tend to be the norm in societies that value production over consumption and they form the anthropological and sociological basis of the “integrated capitalism” of Germany and Japan, a capitalism that favors “technological research, investment, employee development, and employee stability within the enterprise. [This long-term vision] is symmetric with the values of continuity that define the rooted family. . . . The continuity of the family of the past, noble or peasant, becomes the continuity of the enterprise and its projects.” Todd, *supra* note 89, at 77-78.

¶58 The death of the *légitime* in Louisiana is a small part of a larger tale about an increasingly libertarian American culture and the legal system that has grown out of it. Once one moves away from the rhetoric of personal autonomy, government neutrality, and economic liberalism, what does American law and culture have to say about beauty, compassion, service, duty, or love? The increasing disengagement of the American individual from any strong commitment to communal structures of meaning means that individuals are left to define these concepts for themselves, which without some kind of grounding to some shared core values, may ultimately make them meaningless on a broader societal level. Meanwhile, the demands of the American free-market economy have become ever more brutal, and with the nation's social fabric stretched thin, the consequences of a major economic reversal to the social order become frightening to contemplate.

¶59 The family is a place where citizens learn how the bonds that may limit the individual in the short-term often provide salvation for the group in the long run. The nurturing of interdependence within families does not necessarily force the state to define a family in any particular way, nor should it be seen as inevitably leading to the repression of individuality for the sake of a group. Reasonable limits on personal freedom in the interest of creating and sustaining broader collective goals do not have to be inconsistent with democratic liberalism or a respect for personal autonomy, unless of course, one is limited to an American model of the liberal state:

A society with strong collective goals can be liberal . . . provided it is also capable of respecting diversity, when dealing with those who don't share its common goals; and provided it can offer adequate safeguards for fundamental rights. There will undoubtedly be tensions and difficulties in pursuing these objectives together, but such a pursuit is not impossible, and the problems are not in principle greater than those encountered by any liberal society that has to combine, for example, liberty and equality, or prosperity and justice.¹³⁰

¶60 When the city of New Orleans was struck by Hurricane Katrina in 2005, the scenes of the city's poor, sick, and elderly left abandoned without food or water for days in the fetid, post-hurricane squalor caused shock and outrage worldwide. Yet, as disturbing as the images from the desolate city were, equally appalling to many was the fact that so many Americans were "surprised" at the amount of social distress in inner-city New Orleans, one of America's most visited tourist attractions. Yet, New Orleans is hardly unique among American cities in this respect, and an obvious question one might ask is: how could the

¹³⁰ Taylor, *supra* note 1, at 247.

nation be so ignorant of the plight of so many people in its midst? On the other hand, given the ever-more extreme dissociation people from one another in American culture, perhaps a more appropriate query might be: why should anyone have been expected to notice?